OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 99-4 June 3, 1999

TO: All Regional Directors, Officers-in-Charge And Resident Officers

FROM: Fred Feinstein, General Counsel

SUBJECT: Participation by Charging Parties in Section 10(j)Injunction and Section 10(j) Contempt Proceedings

1. *Introduction*

The purpose of this Memorandum is to detail the degree to which charging parties in the underlying unfair labor practice proceeding may participate in the U.S. district court Section 10(j) injunction proceeding. Charging parties in Section 10(j) proceedings should be given the same rights as charging parties in 10(l) proceedings: the "opportunity to appear by counsel and present any relevant testimony." Section 10(l), 29 U.S.C. 160(l). This participation does not, however, include the right to formally intervene as a party in the 10(j) proceeding. It is more analogous to that of an active amicus curiae.

Such participation should apply not only to the initial 10(j) proceeding which seeks the temporary injunction, but also to any subsequent proceedings to modify, amend, reconsider or to oppose a stay of any decree obtained, and any contempt proceeding which seeks a civil contempt adjudication and purgation order.[1]

Set forth below is the legal analysis in support of the argument that charging parties should be denied formal intervention as parties in the injunction proceeding, as well as that supporting the position that charging parties in 10(j) proceedings should be accorded the right of participation due to charging parties in Section 10(l) proceedings. Any charging party motion to intervene should be opposed and any charging party motion for amicus status should be supported, relying upon the analysis set forth below.

2. *The Legislative History of Section 10(j) and the Policies under the Federal Rules Demonstrate that Charging Parties Have No Right to Intervene in 10(j) and 10(l) Proceedings*

In seeking temporary injunctive relief under Section 10(j), the National Labor Relations Board (NLRB or Board) acts solely "in the public interest and not in vindication of purely private rights." Senate Report No. 105 on S.1126, 80th Cong., 1st Sess., p. 8 (April 17, 1947), reprinted in *I Legislative History LMRA 1947* 414 (Government Printing Office 1985).[2] Thus, it is well established that the right to seek a temporary injunction to enjoin unfair labor practices pursuant to Section 10(j) is *exclusively* within the authority of the Board. See *Amalgamated Clothing Workers of America v. Richman Brothers Co.*, 348 U.S. 511, 516-517 (1955).[3] Indeed, during the debate on Section 10(j) and (l) in 1947, Congress defeated a proposed amendment to Section 10(l) to allow private parties direct access to the district courts to seek injunctive relief for certain unfair labor practices. See *Muniz v. Hoffman*, 422 U.S. 454, 465-467 (1975)(discussing legislative history of Taft-Hartley Amendments). Since intervention would permit a party independently to appeal or to seek a contempt citation, granting intervention would inappropriately interfere with the Congressional intent to vest in the Board the exclusive authority to prosecute injunction proceedings. *Penello v. Burlington Industries, Inc.*, 54 LRRM 2165 (W.D. Va. 1963). See also *Sears, Roebuck & Co. v. Carpet, etc. Union*, 410 F.2d 1148, 1150-1151 (10th Cir. 1969), vacated on other grounds as moot, 397 U.S. 655 (1970) (denying intervention at appellate level); *Philips v. Mineworkers*, 218 F. Supp. 103, 105-106 (E.D. Tenn. 1963) (denying intervention for purposes of dissolving the injunction and instituting contempt proceedings).

Courts have also reasoned that because the statutory power to petition for 10(j) and 10(l) relief is limited to the Board, a charging party has no independent interest protectable by intervention under Fed.R.Civ.P., Rule 24(a)(2) or (b)(2). Accordingly, courts have routinely denied charging parties motions to intervene under that Rule. *Reynolds v. Marlene Industries Corp.*, 250 F. Supp. 722, 723-724 (S.D.N.Y. 1966); *Boire v. Pilot Freight Carriers, Inc.*, 86 LRRM 2976, 2978 (M.D. Fla. 1974), aff'd. 515 F.2d 1185 (5th Cir.), reh. denied, 521 F.2d 795 (1975), cert. denied 426 U.S. 934 (1976); *Squillacote v. Local 578, Auto Workers*, 383 F. Supp. 491, 492 (E.D. Wisc. 1974); *Wilson v. Liberty Homes, Inc.*, 500 F. Supp.

1120, 1123 (W.D. Wisc. 1980).[4]

3. *Charging Parties in Section 10(j) Proceedings Should Enjoy the Same Rights of Participation as in Section 10(l) Proceedings*

Section 10(l) expressly directs that charging parties "shall be given an opportunity to appear by counsel and present any relevant testimony." Given the functional similarity of section 10(j) and 10(l)[5] it is appropriate to accord the same degree of participation to charging parties in 10(j) proceedings. Such participation comes under the general rubric of an amicus curiae, a status courts have often granted to charging parties in Section 10(j) cases.[6] Often the court has granted the charging party amicus the same privileges as would be granted under 10(l).[7]

To be sure, a 10(j) charging party amicus, like the 10(l) charging party, is not a full party in the district court proceeding[8] and may not vary the theory of violation being advanced by the Regional Director or initiate an appeal.[9]

4. *Charging Party's Right of Participation Extends to Section 10(j) Civil Contempt Proceedings*

The right to institute proceedings for civil contempt of a temporary interim injunction resides exclusively in the NLRB as a "public agent;" a charging party has no independent authority to bring contempt proceedings. *Shore v. Building and Construction Trades Council*, 50 LRRM 2139 (W.D. Pa. 1962). See also *NLRB v. Retail Clerks International Association*, 243 F.2d 777, 782-783 (9th Cir. 1956)(charging party has no standing to seek injunctive relief to enforce prior court decrees where Board was not seeking such relief); *Philips v. Mine Workers, District 19*, 218 F. Supp. at 107-108 (charging party has no right to continue 10(l) decree or to seek contempt adjudication over objection of Regional Director); *Moore v. Tangipahoa Parish School Board*, 625 F.2d 33, 34 (5th Cir. 1980)(Fed.R.Civ.P. 71 does not allow a nonparty to enforce a court decree where such person has no standing to sue). However, consistent with the general policy set forth above, Regions should consent to the participation of charging parties as amicus curiae in Section 10(j) civil contempt proceedings.

5. *Conclusion*

Consistent with the analysis set forth above, the Regions should deny all requests and oppose all motions of charging parties to obtain formal party status in any Section 10(j) proceeding. However, the Regions should consent to granting the charging parties the status of amicus curiae and the same degree of participation granted to charging parties under Section 10(l) of the Act.

If the Regions have any questions concerning this guideline memorandum, or if issues arise not clearly covered herein, prompt telephonic advice should be sought from the Injunction Litigation Branch in Washington.

F. F.

cc: NLRBU

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[1] Similarly, charging parties should be granted amicus status in any appeal.

[2] See also *Seeler v. The Trading Port, Inc.*, 517 F.2d 33, 40 (2d Cir. 1975).

[3] Accord: *Walsh v. I.L.A.*, 630 F.2d 864, 871-872 (1st Cir. 1980); *California Assoc. of Employers v. BCTC of Reno, Nevada*, 178 F.2d 175, 179 (9th Cir. 1949); *Amalgamated Assoc. of Street and Motor Coach Employees v. Dixie Motor Coach Corp.*, 170 F.2d 902, 907 (8th Cir. 1948); *Amazon Cotton Mill Company v. Textile Workers Union of America*, 167 F.2d 183, 185-187 (4th Cir. 1948); *Brown & Sharpe Mfg. Co. v. District 64, IAM*, 535 F. Supp. 167, 169 n. 2 (D. R.I. 1982).

[4] Other district courts have denied intervention without reference to Rule 24. See, *NLRB v. Ona Corp.*, 605 F. Supp. 874, 876 (N.D. Ala. 1985); *Gottfried v. Mayco Plastics, Inc.*, 472 F. Supp. 1161, 1163, 1164 (E.D. Mich. 1979), affd. 615 F.2d 1360 (6th Cir. 1980)(table). Other appellate courts have also denied intervention. See, *Hirsch v. Building and Construction Trades Council of Phila. & Vicinity*, AFL-CIO, 530 F.2d 298, 307-308 (3d Cir. 1976); *Compton v. N.M.U.*, 533 F.2d 1270, 1276 n. 4 (1st Cir. 1976); *Solien v. Miscellaneous Drivers etc.*, 440 F.2d 124, 129-132 (8th Cir.), cert. denied 403 U.S. 905 (1971); *Henderson v. Operating Engineers, Local 701*, 420 F.2d 802, 806 n. 2 (9th Cir. 1969).

[5] The two provisions were enacted as companion provisions: section 10(l) mandates the Board to seek injunctive relief in cases involving certain enumerated unfair labor practices (chiefly, unlawful secondary boycotts); 10(j) authorizes the Board, in its discretion, to seek injunctive relief in all other cases. The standards for determining the propriety of injunctive relief are generally the same. *Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076, 1084 (3d Cir. 1984); *Kinney v. Local 150*, 994 F.2d 1271, 1276 (7th Cir. 1993). Although one court has held that the absence of any reference in 10(j) to charging party participation distinguishes it from 10(l) (see *Wilson v. Liberty Homes, Inc.*, 500 F. Supp. at 1123), that view has not been adopted generally and that decision has not been read as a rejection of all right to participate in 10(j) proceedings. See *Dunbar v. Landis Plastics, Inc.*, 996 F. Supp. 174, 179-180 (N.D.N.Y. 1998), remanded on other grounds 152 F.3d 917 (2d Cir. 1998) (table) (distinguishing Liberty Homes and granting amicus curiae status to charging party).

[6] See, e.g., *Dunbar v. Landis Plastics, Inc.*, 996 F. Supp. at 179-180; *D'Amico v. United States Service Industries, Inc.*, 867 F. Supp. 1075, 1079 (D. D.C. 1994); *Garner v. Macclenny Products, Inc.*, 859 F. Supp. 1478, 1479 (M.D. Fla. 1994); *Zipp v. Caterpillar, Inc.*, 858 F. Supp. 794, 795 (C.D. Ill. 1994); *Gottfried v. Mayco Plastics, Inc.*, 472 F. Supp. 1161, 1163, 1164 (E.D. Mich. 1979), aff'd. 615 F.2d 1360 (6th Cir. 1980); *NLRB v. Ona Corp.*, 605 F. Supp. 874, 876 (N.D. Ala. 1985); *McLeod v. General Electric Company*, 257 F. Supp. 690, 692 n. 1 (S.D.N.Y.), revd. on other grounds 366 F.2d 847 (2d Cir. 1966), stay granted 87 S.Ct. 5, vacated and remanded 385 U.S. 533 (1967).

[7] See *McLeod v. General Electric Company*, 257 F. Supp. at 692, n. 1 (may appear by counsel, examine and cross examine witnesses and make legal submissions); *NLRB v. Ona Corp.*, 605 F. Supp. at 876 (afforded full opportunity to be heard, to examine and cross-examine witnesses and present evidence bearing upon the issues); *Dunbar v. Landis Plastics, Inc.*, 996 F. Supp. at 180 (permitted to file memoranda and evidentiary affidavits and to participate in oral argument).

[8] See rationale above p. 2, for denying intervention by charging parties. See also *The Miller-Wohl Co., Inc. v. Commission of Labor and Industry, State of Montana*, 694 F.2d 203, 204 (9th Cir. 1982) (amici are not parties; grant of motion to intervene is necessary to confer party status); *Morales v. Turman*, 820 F.2d 728, 732 (5th Cir. 1987) (same).

[9] See *McLeod v. Business Machine Conference Board*, 300 F.2d 237, 242-243 (2d Cir. 1962); *Sears Roebuck & Co. v. Carpet, etc. Union*, 410 F.2d at 1150-1151. See also *Moten v. Bricklayers, Masons, etc.*, 543 F.2d 224, 227 (D.C. Cir. 1976) (where litigant did not seek intervention, its position was analogous to amicus; as such it had no authority to appeal); *Richardson v. Alabama State Board of Education*, 935 F.2d 1240, 1247 (11th Cir. 1991) and cases cited (refusing to consider arguments of amici not presented by party).